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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Parts 1270 and 1275

[Docket No. NHTSA-2016-0099]

RIN 2127-AL45

Transfer and Sanction Programs

AGENCIES: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule responds to comments received on the interim final rule published September 30, 2016, and makes minor clarifications to the Federal implementing regulations for the Section 154 (Open Container) and Section 164 (Repeat Intoxicated Driver) programs.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For access to the docket to read comments received, go to <http://www.regulations.gov> and search for docket number NHTSA-2016-0099.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94, amended 23 U.S.C. 154 (Section 154) and 23 U.S.C. 164 (Section 164), which address the serious national problems of impaired driving by encouraging States to meet minimum standards for their open container laws and repeat intoxicated driver laws.

Under Section 154, to avoid the transfer of funds, a State must enact and enforce an open container law “that prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State.” 23 U.S.C. 154(b)(1).

Under Section 164, to avoid the transfer of funds, a State must enact and enforce a repeat intoxicated driver law that establishes, at minimum, certain specified penalties for second and subsequent convictions of driving while intoxicated or driving under the influence.

23 U.S.C. 164(a)(5). All 50 States, the District of Columbia, and Puerto Rico are considered to be “States” for the purposes of these programs.

The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) (“the agencies”) jointly issued an interim final rule (IFR), with immediate effectiveness, on September 30, 2016, (81 FR 67158) to ensure that States received instructions that were important to the compliance determinations made on October 1, 2016, when the changes in the FAST Act became effective. The IFR amended the Federal implementing regulations for Section 154 at 23 CFR part 1270 and Section 164 at 23 CFR part 1275 to reflect the changed requirements from the Federal legislation. At the same time, the agencies updated the regulations to improve clarity, codify longstanding interpretation of the statutes and implementing regulations, and streamline procedures for States. The agencies sought public comment to inform the promulgation of a final rule. This action addresses the comments received and makes minor changes to the Federal implementing regulations.

II. Summary of the Interim Final Rule

The IFR implemented the new compliance provisions of the FAST Act and also updated the rules to incorporate prior statutory changes from the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141 (enacted July 6, 2012), and the SAFETEA-LU Technical Corrections Act of 2008, Public Law 110-244 (enacted June 6, 2008). The preamble to the IFR also provided additional information regarding the programs, and the agencies encourage States to review it in conjunction with this preamble and the final implementing regulations.

Some of the revisions in the IFR to the Section 154 and Section 164 implementing regulations in 23 CFR parts 1270 and 1275 were made simply to allow States to better understand the programs and attain and maintain compliance. These revisions did not

substantively amend the compliance requirements of the programs. Such revisions included amending or adding definitions, clarifying and broadening permitted exceptions in the Section 154 program, and making technical corrections as necessary.

Because the FAST Act significantly amended the compliance criteria for the Section 164 program, the IFR also made conforming revisions to the Section 164 implementing regulations in 23 CFR part 1275. The IFR implemented the revised one-year license sanction requirement, allowing States three options for repeat offenders: suspension of all driving privileges, restriction to operating only motor vehicles with an ignition interlock device installed (allowing for limited employment and medical exceptions), or participation in and compliance with a 24-7 sobriety program. It eliminated the vehicle sanction requirement, which was repealed by the FAST Act, but made no changes to the assessment and treatment requirement, which has not changed since its inception. Finally, it made two changes to the minimum sentence requirement: clarifying the hour-equivalents for days served in imprisonment or community service and implementing the annual “general practice” certification option for incarceration in lieu of having a compliant mandatory minimum sentence. With regard to the latter, a State may certify for a second offender that its “general practice is that such an individual will be incarcerated” and for a third or subsequent offender that its “general practice is that such an individual will receive 10 days of incarceration.” 23 U.S.C. 164(a)(5)(C)(i)-(ii). To meet the statutory standard of “general practice,” the IFR requires a State to certify that 75 percent of repeat offenders are subject to mandatory incarceration for the minimum sentences specified for the calendar year immediately prior to the certification.

Finally, the IFR updated the non-compliance penalties and procedures in the regulations to reflect amendments made to the Federal statutes by the SAFETEA-LU Technical Corrections Act and MAP-21. The IFR also reorganized the regulations to improve clarity, streamlined some of the procedures that apply to States, reduced paperwork burdens, and better aligned the regulations with the longstanding administrative practices under the programs.

III. Public Comments on the Interim Final Rule

The agencies received only two comments on the IFR: one addressing Section 154 (anonymous commenter; NHTSA-2016-0099-0002) and one addressing Section 164 (Transportation Departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming [“State DOTs”]; NHTSA-2016-0099-0003).

The anonymous commenter requested that the final rule “provide more information about the exceptions to locations of an open container within the vehicle.” Specifically, the commenter wanted more information about “vehicles without the typical trunk that have no cover for the hatch in the back...because it could possibly be accessible to a determined passenger and potentially lead me to severe penalties.” Open container laws differ significantly from State to State. Therefore, the commenter should consult the law of the particular State to determine enforcement details and penalties. However, for purpose of compliance with Section 154, a State may allow possession of an open alcoholic beverage container “in a locked container (such as a locked glove compartment), or, in a motor vehicle that is not equipped with a trunk, either behind the last upright seat or in an area not normally occupied by the driver or a passenger.”²³ CFR 1270.4(d)(1). A State would not be determined to be out of compliance with

Section 154 if it allows an open container to be possessed in the area behind the last upright seat in a hatchback-style vehicle, regardless of whether that area is covered. The agencies are making no changes in this final rule in response to this comment.

The State DOTs requested greater flexibility in the “general practice” certification, allowing for approaches other than 75 percent incarceration during the calendar year prior to the date of certification. The commenters cite to the following statement from Senator John Thune during the Senate floor debate: “This provision is intended to allow States to certify the general practice on minimum penalties which can meet the definition under the repeat offender law, and we expect that NHTSA should reasonably defer to a State’s analysis underpinning such a certification.” 161 *Congressional Record* S8359 (December 3, 2015, daily ed.). The State DOTs requested that States be permitted to certify with percentages as low as 51 percent, particularly “if there is evidence of a trend of an increasing percentage or other relevant information provided by the State.”

The agencies do not believe it is appropriate to accept certifications on the basis of 51 percent of repeat offenders receiving the statutorily required penalties, as this essentially renders the practice “as likely as not” and does not establish a “general practice,” as specified in the statute. The pre-enactment statement in floor debate does not serve to change the meaning of that statutory term. The agencies continue to believe that 75 percent provides a reasonable and appropriate balance between flexibility and mandatory minimum sentences for 100 percent of offenders (as required for States complying on the basis of their law, rather than a “general practice” certification). We note that NHTSA did, in fact, defer to States’ analyses of their own incarceration data

underpinning their “general practice” certifications for fiscal year 2017, 2018, and 2019 submissions when they certified to meeting the 75 percent requirement. The agencies are making no changes in this final rule in response to this comment.

IV. Revisions in the Final Rule

The agencies are making two revisions in this final rule. The first relates to the opportunity for States determined to be non-compliant with either Section 154 or Section 164 to submit documentation showing why they are compliant. In the IFR, the agencies gave States 30 days from the date of issuance of the notice of apportionments under 23 U.S.C. 104(e) by FHWA, which normally occurs on October 1, to submit this documentation. 23 CFR 1270.8(b) and 1275.8(b). However, the agencies tied the deadlines for submission of “shift” and “split” letters to 30 and 60 days, respectively, from the date “the funds are reserved.”¹ 23 CFR 1270.6(b), 1270.7(a), 1275.6(b), and 1275.7(a). Although the date of issuance of the notice of apportionments and the reservation of funds is normally the same, in some years FHWA has rescinded and subsequently reissued the notice of apportionments. The agencies do not intend to grant an extension of time for submission of additional documentation or “shift” and “split” letters in the event of such a reissuance, as the State will already have been on notice of its non-compliance for the fiscal year because of the original reservation of funds. To eliminate confusion and align these deadlines, the agencies are amending the Section 154 and Section 164 regulations to require submission of any additional documentation within “30 days from the date the funds are reserved.”

¹ While all non-compliant States are required to submit “split” letters to receive the reserved funds (*see* 23 CFR 1270.7(a) and 1275.7(a)), submission of “shift” letters by non-compliant States is optional (*see* 23 CFR 1270.6(b) and 1275.6(b)). If FHWA does not receive a “shift” letter from a non-compliant State, the default reservation of funds (based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1) and (b)(2)) will remain.

The second relates to the “special exception” to interlock use under Section 164 for individuals certified by a medical doctor as being unable to provide a deep lung breath sample for analysis by an ignition interlock device. The agencies are changing “certified by a medical doctor” to “certified in writing by a physician” to align with NHTSA’s implementing regulations for 23 U.S.C. 405(d)(6)(F)(ii). *See* 23 CFR 1300.23(g)(2)(ii). The agencies believe a certification, by definition, must be in writing. Because the statutory language underlying the special exception in Section 164 is identical to the exception permitted in NHTSA’s Grants to States with Alcohol-Ignition Interlock Laws program, and the agency’s regulatory language in that program also was subject to public notice and comment, it is appropriate to bring the language of the Section 164 implementing regulations into alignment with that program.

V. Effective Date and Future Actions

The agencies issued the IFR with an immediate effective date to ensure that States received instructions that were important to compliance determinations made on October 1, 2016, as the changes in the FAST Act became effective on that date. The effective date for this final rule is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This final rule has no effect on determinations made on October 1, 2018, for Federal fiscal year 2019.

NHTSA and FHWA are committed to ensuring transparency in the administration of these programs and maintaining open and active communication with States. For example, the agencies will continue to notify States of potential non-compliance issues for the forthcoming fiscal year in FHWA’s advance notification of apportionment, normally issued 90 days prior to the official apportionment notice, if such information is

available to the agencies at that time. The agencies will also notify States at other points throughout the year if they become aware of potential non-compliance issues. However, to provide this information in a timely fashion for States to react as appropriate, the agencies continue to rely upon States for prompt notification of changes in their laws. *See, e.g.,* 23 CFR 1270.9(b) and 1275.9(b). Although the regulations require a State to “promptly notify” the appropriate NHTSA Regional Administrator in writing only of any actual change or change in enforcement of the law, States are invited also to submit prospective changes (e.g., pending legislation) to NHTSA throughout the year for a preliminary review of their impact on compliance.

In addition, the agencies recognize that States would benefit from receiving more information from the agencies regarding compliance requirements, procedures, and relevant points of contact. NHTSA and FHWA are exploring ways to improve the availability of information on the programs for States to better allow them to obtain and maintain compliance, and we are committed to rolling these improvements out in the coming months. The agencies invite States to provide suggestions on how we can improve transparency by contacting the individuals listed in FOR FURTHER INFORMATION CONTACT above.

VI. Regulatory Analyses and Notices.

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563, and DOT Regulatory Policies and Procedures

NHTSA and FHWA have considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation’s regulatory policies and procedures. This rulemaking document was not reviewed under

Executive Order 12866 or Executive Order 13563. This rule will only affect the compliance status of a very small handful of States and will therefore affect far less than \$100 million annually. Whether a State chooses to enact a compliant law or make a certification is dependent on many variables, and cannot be linked with specificity to the issuance of this rule. States choose whether to enact and enforce compliant laws, thereby complying with the programs. If a State chooses not to enact and enforce a conforming law, its funds are conditioned, but not withheld. Accordingly, the total amount of funding provided to each State does not change. The costs to States associated with this rule are minimal (e.g., passing and enforcing alcohol impaired driving laws) and are expected to be offset by resulting highway safety benefits. Therefore, this rulemaking has been determined to be not “significant” under the Department of Transportation’s regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that an action would not have a significant economic impact on a substantial number of small entities.

This final rule updates the Section 154 and Section 164 implementing regulations based on recent Federal legislation. The requirements of these programs only affect State governments, which are not considered to be small entities as that term is defined by the RFA. Therefore, we certify that this action will not have a significant impact on a substantial number of small entities and find that the preparation of a Regulatory Flexibility Analysis is unnecessary.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on “federalism” requires the agencies to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” 64 FR 43255 (August 10, 1999). “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, an agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. An agency also may not issue a regulation with federalism implications that preempts a State law without consulting with State and local officials.

The agencies have analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132, and have determined that this

final rule would not have sufficient federalism implications as defined in the order to warrant formal consultation with State and local officials or the preparation of a Federalism summary impact statement. However, the agencies continue to engage with State representatives regarding general implementation of the FAST Act, including these programs, and expects to continue these informal dialogues.

D. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988 (61 FR 4729 (February 7, 1996)), “Civil Justice Reform,” the agencies have considered whether this rule would have any retroactive effect. We conclude that it would not have any retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rulemaking would not establish any new information collection requirements.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local or

tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually (adjusted annually for inflation with base year of 1995). This final rule would not meet the definition of a Federal mandate because the resulting annual State expenditures to comply with the programs would not exceed the minimum threshold.

G. National Environmental Policy Act

NHTSA has considered the impacts of this rulemaking action for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4347). The agency has determined that this rulemaking would not have a significant impact on the quality of the human environment. FHWA has analyzed this action for the purposes of NEPA and has determined that it would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

H. Executive Order 13175 (Consultation and Coordination With Indian Tribes)

The agencies have analyzed this IFR under Executive Order 13175, and have determined that this action would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

I. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Regulatory and Deregulatory Actions. The Regulatory Information Service Center publishes the Unified Agenda in or

about April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

J. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the *Federal Register* published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

Authority: 23 U.S.C. 154 and 164; delegation of authority at 49 CFR 1.85 and 1.95.

List of Subjects in 23 CFR Parts 1270 and 1275

Alcohol abuse, Highway safety, Intergovernmental relations, Reservation and transfer programs—transportation.

For the reasons discussed in the preamble, under the authority of 23 U.S.C. 154 and 164, the National Highway Traffic Safety Administration and the Federal Highway Administration amend 23 CFR chapter II as follows:

PART 1270—OPEN CONTAINER LAWS

1. The authority citation for part 1270 continues to read as follows:

AUTHORITY: 23 U.S.C. 154; delegation of authority at 49 CFR 1.85 and 1.95.

2. Amend § 1270.8 by revising the first sentence of paragraph (b) to read as follows:

§ 1270.8 Procedures affecting States in noncompliance.

* * * * *

(b) Each State whose funds are reserved under § 1270.6 will be afforded 30 days from the date the funds are reserved to submit documentation showing why it is in compliance. * * *

PART 1275—REPEAT INTOXICATED DRIVER LAWS

3. The authority citation for part 1275 continues to read as follows:

AUTHORITY: 23 U.S.C. 164; delegation of authority at 49 CFR 1.85 and 1.95.

4. Amend § 1275.4 by revising paragraph (b)(2) to read as follows:

§ 1275.4 Compliance criteria.

* * * * *

(b) * * *

(2) The individual is certified in writing by a physician as being unable to provide a deep lung breath sample for analysis by an ignition interlock device.

5. Amend § 1275.8 by revising the first sentence of paragraph (b) to read as follows:

§ 1275.8 Procedures affecting States in noncompliance.

* * * * *

(b) Each State whose funds are reserved under § 1275.6 will be afforded 30 days from the date the funds are reserved to submit documentation showing why it is in compliance (which may include a “general practice” certification under § 1275.5). * * *

Issued in Washington, DC, on: February 1, 2019
under authority delegated in 49 CFR 1.95 and 501.5.

Heidi R. King,
Deputy Administrator, National Highway Traffic Safety Administration.

Issued in Washington, DC, on: February 1, 2019
under authority delegated in 49 CFR 1.85.

Brandye L. Hendrickson,
Deputy Administrator, Federal Highway Administration.
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